UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. NATIONAL UROLOGICAL GROUP, INC., *et al.* Defendants.	Civil Action No: 2:12-mc-02375-KOB (re: motion to quash relating to 1:04-CV-3294-CAP in the Northern District of Georgia)

PLAINTIFF'S MOTION FOR RECONSIDERATION AND OPPOSITION TO MOTION TO QUASH SUBPOENAS DIRECTED TO JOSEPH P. SCHILLECI, JR.

I. Motion for Reconsideration

The FTC respectfully requests reconsideration of the Court's July 17, 2012 Order ("Order") (ECF No. 4) to permit it a full and fair opportunity to respond to the motion to quash subpoenas for deposition and the production of documents directed to Joseph P. Schilleci, Jr. ("Schilleci"), counsel for defendants Hi-Tech Pharmaceuticals ("Hi-Tech") and Jared Wheat, pursuant to the Court's rules. At 12:33 P.M., on July 17, 2012, the fourteenth day after Hi-Tech, Wheat, and Schilleci's filing of that motion, this Court granted the motion on the grounds that: 1) the FTC had failed to respond in the intervening two weeks; and 2) the subpoenas were "overly broad and would very likely result in the disclosure of

information protected by the attorney-client privilege *beyond* the categories of communication Judge Pannell deemed waived." Order at 2 (emphasis original).

The FTC respectfully requests reconsideration "to correct a clear error of law or manifest injustice." *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1328 (N.D. Ala. 2010). The Local Rules for the Northern District of Alabama do not provide a standard time for the filing of oppositions to motions. The FTC consulted with the Court's chamber rules, which provide that "ALL briefs, whether on pretrial or post trial motions, must comply with the requirements of "Appendix II" as far as practicable given the nature of the particular motion, including page limitations, unless the court grants specific permission to deviate. Unless the motion is dispositive, parties are not required to comply with Section D." *See* Bowdre Chamber Rules, attached as Plaintiff's Exhibit A. Appendix II, in turn, provides that oppositions to motions are due 21 days after the filing of the initial motion. *See* Appendix II, attached as Plaintiff's Exhibit B. In any event, the FTC intended to file its response today, which is, in fact, the fourteenth day after the filing of the motion to quash.[1] Accordingly, reconsideration is warranted to give

[1] Pursuant to Fed. R. Civ. P. 6, which governs the computation of time under the Federal Rules, when calculating a period of days, parties are to "exclude the day of the event that triggers the period." Fed. R. Civ. P. 6(a)(1)(A). Thus, July 3, the date on which the motion was filed, is excluded. Fourteen days from July 4, the first day of any applicable deadline period, is July 17. Moreover, Rule 6 also provides that "[u]nless a different time is set by a statute, local rule, or court order, the last day [of a filing period] ends: (A) for electronic filing, at midnight in the court's time zone." Fed. R. Civ. P. 6(a)(4).

the FTC an opportunity to be heard and avoid clear error and/or manifest injustice.

To that end, the FTC includes its substantive response to the motion herein.

II. Opposition to Motion to Quash

The subpoenas directed to Schilleci, a resident of this district, relate to an ongoing contempt action against Hi-Tech, Wheat, Stephen Smith, and Mark Wright, before Judge Charles A. Pannell, of the Northern District of Georgia.[2]

Under Federal Rule of Civil Procedure 45, quashing a subpoena is inappropriate where, as here, a waiver applies and when there is no undue burden. *See* Fed. R. Civ. P. 45. Judge Pannell ruled on January 20, 2012, that Hi-Tech and Wheat waived their attorney-client privilege by alleging as an affirmative defense to the FTC's contempt allegations that they relied in good faith on the advice of counsel that they were in compliance with Judge Pannell's final judgment. Moreover, the information sought by the FTC is not overly broad or unduly burdensome because it seeks only the "attorney-client communications and other documents that contain or relate to the advice that counsel gave them about the compliance of their advertising with the final judgment and the FTC Act," *see* Defs.' Mot. Exhibit D at 3, the very subject of the waiver. Accordingly, the FTC requests that the Court deny the motion to quash or, to the extent the Court has questions regarding the scope of the waiver found by Judge Pannell, to transfer the

[2] Schilleci does not represent Smith or Wright and, thus, they are not parties to Hi-Tech's and Wheat's motion.

motion to the Nothern District of Georgia so that he may interpret the subpoena in light of his own ruling.[3]

A. Background

On November 1, 2011, the FTC filed a motion for an order to show cause why Hi-Tech and Wheat should not be held in contempt for violating the final judgment by advertising weight-loss supplements Fastin, Lipodrene, Benzedrine, and Stimerex-ES with claims that were not supported by competent and reliable scientific evidence as required by the final judgment.[4] On May 31, 2012, Judge Pannell ordered Hi-Tech and Wheat to show cause why they should not be held in contempt. In opposition to the show cause motion, Hi-Tech and Wheat asserted the affirmative defense that they relied in good-faith on the advice of counsel, Edmund Novotny ("Novotny"), that their advertising complied with Judge

[3] Moreover, at a status conference before Judge Pannell, held on May 31, 2012, counsel for Hi-Tech and Wheat stated their intention to file a motion for a protective order in response to any subpoenas directed to Mr. Schilleci, and Judge Pannell clearly contemplated that such a motion would be filed in the Northern District of Georgia for his consideration. *See* Tr. of 5/31/12 Hearing at 27-29 (attached as Plaintiff's Exhibit C) ("THE COURT: Well, he can file this motion. I can see that no matter what I do today I'm still going to have to redo it in some kind of Order pursuant to some kind of motion."). Subsequently, on June 4, 2012, during a conference call with FTC counsel, Mr. Wenik reiterated that he expected that any discovery disputes in the matter would be handled by Judge Pannell. Instead, in an attempt to get a second bite at the apple and obtain a conflicting ruling on the issue of waiver, Hi-Tech, Wheat, and Schilleci filed a motion with this Court.

[4] The FTC also moved for an order to show cause against defendants Stephen Smith and Mark Wright, who are not before this court.

Pannell's final judgment.[5]

On December 14, 2011, the FTC filed a motion to determine the scope of Hi-Tech and Wheat's attorney-client privilege waiver through the assertion of the advice of counsel defense. On January 20, 2012, after the motion was fully briefed, Judge Pannell granted the FTC's motion and found that Hi-Tech and Wheat waived their attorney-client privilege by asserting the advice of counsel defense. Specifically, Judge Pannell decided that the scope of the waiver was not limited to "the single attorney [Novotny] they consulted regarding compliance with the judgment" but extended "to ***all other communications*** relating to the same subject matter." Defs.' Mot., Ex. D. at 3 (emphasis added). Thus, he found that Hi-Tech and Wheat waived privileged with respect to both "***attorney-client communications and other documents*** that contain or relate to advice that counsel gave them about the compliance of their advertising with the final judgment and the FTC Act." *Id*.

To conduct discovery into the advice of counsel defense, the FTC served the document and deposition subpoenas at issue to Schilleci because the evidence demonstrated that he also gave advice about the compliance of Hi-Tech advertising

[5] Ga. Dkt. No. 346 at 11-12 (Memorandum Of Law Of Defendants Hi-Tech Pharmaceuticals, Inc. And Jared Wheat In Opposition To Plaintiff's Motion For An Order To Show Cause And Plaintiff's Motion To Modify The Final Judgment); Ga. Dkt. No. 346-1 at 7-8 (Declaration Of Jared Wheat In Support Of Contempt Defendants' Response To Plaintiff's Motion For Order To Show Cause And Motion To Modify The Final Judgment).

with the final judgment.[6] The FTC served nearly identical subpoenas on Novotny.

The requested discovery is narrowly tailored to the advice Schilleci gave about Hi-Tech and Wheat's compliance with the final judgment. In an attempt to hide unfavorable evidence and disclose only favorable evidence, Hi-Tech and Wheat have moved to quash the Schilleci subpoenas, but not the Novotny subpoenas.[7] Hi-Tech and Wheat are therefore impermissibly attempting to use the attorney-client privilege as both a sword and a shield.

B. The Motion To Quash Should Be Denied Because Hi-Tech And Wheat Waived Their Attorney-Client Privilege And The FTC's Subpoenas Are Not Unduly Burdensome.

Hi-Tech, Wheat, and Schilleci base their motion to quash on Fed. R. Civ. P. 45(c)(3)(iii) and (iv), which provide that "the issuing court must quash or modify a subpoena that . . . (iii) requires disclosure of privileged or other protected matter, *if no exception or waiver applies*; or (iv) subjects a person to undue burden." Emphasis added. The motion to quash should be denied because a waiver applies to the documents and testimony requested by the subpoenas, and the subpoenas do

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[6] Ga. Dkt. No. 366 at 11-14 (Plaintiff's Reply In Support Of Its Motion For An Order To Show Cause Why Contempt Defendants Hi-Tech Pharmaceuticals, Jared Wheat And Stephen Smith Should Not Be Held In Contempt For Violating The Final Judgment And Permanent Injunction And Its Motion To Modify The Final Judgment) (attached as Plaintiff's Exhibit D).

[7] On July 16, 2012, John S. Hicks, Assistant General Counsel and Ethics Counsel for Baker, Donelson, informed the FTC that Hi-Tech and Wheat have consented to the disclosure of advice from Novotny in response to subpoenas that are nearly identical to those the FTC served on Schilleci.

not subject Schilleci to undue burden.

1. As The Court Has Recognized, A Waiver Applies To The Documents And Testimony Sought By The FTC's Subpoenas Because Judge Pannell Already Decided that Hi-Tech And Wheat Waived Their Attorney-Client Privilege.

As the Court has recognized, Judge Pannell's determination that Hi-Tech and Wheat have waived attorney-client privilege over "attorney-client communications and other documents that contain or relate to advice that counsel gave them about the compliance of their advertising with the final judgment and the FTC Act" is law of the case. *See* Order at 2; *see also United States v. Exxon Corp.*, 94 F.R.D. 246, 247-8 (D.D.C. 1981) (court's prior discovery opinion established as the law of the case that defendant had waived its attorney-client privilege and that any documents pertinent to defendant's defense of good faith were therefore discoverable).[8] Judge Pannell's ruling on the waiver and its scope

[8] Because Judge Pannell has ruled that Hi-Tech and Wheat waived privilege over not only communications with Novotny but "all other communications . . . relating to the same subject matter," Defs.' Mot. to Quash, Ex. D, at 3, the Alabama Rules of Professional Conduct do not prohibit Schilleci from disclosing the requested information. *See* Comments to Alabama Rule of Professional Conduct 1.6 (Disclosures Otherwise Required or Authorized); *Chesnoff v. United States (In re Grand Jury Proceedings)*, 13 F.3d 1293, 1296-97 (9th Cir. 1993) (relying on Comments to Rule 1.6 of the Model Code of Professional Conduct, which is the same as Alabama Rule 1.6, court held that district court did not abuse its discretion in holding attorney in contempt of court for his refusal to testify before a grand jury). Schilleci has not cited to any case prohibiting him from disclosing attorney-client communications when a judge has issued a court order, as Judge Pannell has, finding that the attorney-client privilege has been waived.

is a well-reasoned decision based on controlling Eleventh Circuit authority.[9]

2. The Scope Of The Subpoena Is Consistent With And Tracks To The Language Of Judge Pannell's Order.

The FTC's subpoena specifications are not overly broad. The FTC drafted the subpoena specifications with an eye towards Judge Pannell's waiver order. As the Court has recognized, Judge Pannell found that Hi-Tech and Wheat waived privilege with respect to:

> [A]ttorney-client communications and other documents that contain or relate to advice that counsel gave them about the compliance of their advertising[10]

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[9] *See Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1418-19 (11th Cir. 1994) ("[I]t would be inequitable to allow . . . [a party] to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law."); *Mohawk Indus. v. Interface, Inc.*, 2008 WL 5210386, at *7 (N.D. Ga. Sept. 29, 2008) ("Once a party waives the attorney-client privilege as to a communication, the waiver generally 'extends to all other communications relating to the same subject matter.'"); *Chick-Fil-A v. ExxonMobil Corp.*, 2009 U.S. Dist. LEXIS 109588, at *17 (S.D. Fla. Nov. 10, 2009) (finding that subject matter waiver was warranted under Fed. R. Evid. 502(a) because it would be unfair to permit party to produce privileged information supporting its contentions while at the same time withholding other privileged information that may undermine them).

[10] The final judgment against Hi-Tech and Wheat defines "advertisement" as "any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television, or cable television, audio program transmitted over a telephone system, program-length commercial ("infomercial"), Internet website (including metatags), or in any other medium." *See* Final Judgment and Permanent Injunction Against National Urological Group, Inc., Hi-Tech Pharmaceuticals, Inc., Jared Wheat,

with the final judgment and the FTC Act.

Defs.' Mot. to Quash, Ex. D. at 3.

Subpoena Specification 2 seeks information specifically relating to advice concerning the compliance of Hi-Tech and Wheat's advertising with the final judgment exactly as Judge Pannell ruled. Specifically, Specification 2 asks for:

> All documents containing or relating to advice that you [Schilleci] gave Contempt Defendants, whether orally or in writing, about the compliance or non-compliance of any print advertisement, direct mailing piece, web page, product packaging or product label, whether in draft or final form, including but not limited to, those identified as FTC 3, Attachments 4-8, 13-16, 18-19, 21-22, 24-26 (attached), with the Hi-Tech Order. The documents produced should include, but not be limited to, drafts of any such advertisements, edits communicated to Contempt Defendants, any communications with Contempt Defendants (whether via email, text message, letter, voicemail or by other written or electronic means), and any notes or memoranda describing, relating to, or memorializing communications with Contempt Defendants, and records of the dates and times of such communications.

Defs.' Mot. to Quash, Ex. A at 13-14.

Similarly, Subpoena Specification 3 seeks only documents about the very waiver Judge Pannell found. Specifically, Specification 3 asks for:

> All documents containing or relating to advice that you gave Contempt Defendants, whether orally or in writing, about the use of footnotes or disclaimers in connection with any print advertisement, direct mail piece, web page, product package, or product label for Fastin, Lipodrene, Stimerex-ES, and Benzedrine. The documents produced should include, but not be limited to, drafts of any such footnotes or disclaimers, edits communicated to Contempt Defendants, any communications with Contempt Defendants (whether via email, text message, letter, voicemail or

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Thomasz Holda, and Stephen Smith ("Hi-Tech Order") at 4, Definition 2 (attached as Plaintiff's Exhibit E).

> by other written or electronic means), notes or memoranda describing, relating to, or memorializing communications with Contempt Defendants, and records of the dates and times of such communications**.**

Defs.' Mot. to Quash, Ex. A at 14.

Similarly, Specification 1 asks for:

> All documents containing or relating to advice that you gave Contempt Defendants, whether orally or in writing, about compliance with the Hi-Tech Order. The documents produced should include, but not be limited to, communications with Contempt Defendants (whether via email, text message, letter, voicemail or by other written or electronic means), any notes or memoranda describing, relating to, or memorializing communications with Contempt Defendants, and records of the dates and times of such communications.

Defs.' Mot. To Quash, Ex. A. at 13. Although Subpoena Specification 1 does not specifically delineate the types of advertising covered, it is necessarily limited to Hi-Tech and Wheat's advertising since the injunctive provisions of the final judgment only reach defendants' advertising activities. *See* Plaintiff's Exhibit E at 10-17 (Sections I-VI).

Of course, even if a subpoena specification is overly broad, Rule 45 expressly permits the Court to modify the subpoena, rather than impose the more drastic remedy of quashing it. *See* Rule 45(c)(3)(A). In fact, "modification of a subpoena is preferable to quashing it outright." *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). Thus, to the extent the Court is concerned about the breadth of Specification 1, it can appropriately modify the specifications to address those concerns. *See Fadalla v. Life Automotive Prods.*,

Inc., 258 F.R.D. 501, 507 (S.D. Fla. 2007); *see also Wiwa*, 392 F.3d at 818.[11]

3. **Judge Pannell's Prior Ruling On Hi-Tech and Wheat's Waiver Warrants Transferring The Motion To The Northern District Of Georgia For His Consideration.**

To the extent that questions concerning the scope of the waiver exist, transfer of the motion to quash to the Northern District of Georgia is appropriate. Given that Judge Pannell has already ruled that Hi-Tech's and Wheat's assertion of the advice of counsel defense operates as a subject-matter waiver that extends to all counsel with whom they consulted regarding the compliance of their advertising with the final judgment, Judge Pannell is in the best position to answer any questions regarding what types of documents are covered by that waiver.

Moreover, the Court has the authority to transfer the motion to Judge Pannell. *See Melder v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 34118 (N.D. Ga. Apr. 25, 2008) (court transferred motion to quash as best way to ensure that ruling on motion would be consistent with trial court's other discovery rulings)*; see also In re Digital Equipment Corp.,* 949 F.2d 228 (8th Cir. 1991) (court issuing subpoena can remit objections to trial court to give trial court

[11] Hi-Tech, Wheat, and Schilleci's argument to this Court that the FTC can obtain the information it seeks from another source, Novotny, boils down to the same argument Judge Pannell rejected. They are again attempting to rely only on advice of counsel favorable to their defense, while hiding advice of counsel that is unfavorable. The specific advice that Schilleci gave is not available from any other source. The evidence already in hand demonstrates that Schilleci and Novotny gave contradictory advice to Hi-Tech and Wheat concerning the advertisements' compliance with the final judgment. *See* Plaintiff's Exhibit D at 12-14.

jurisdiction to rule on objections); *Petersen v. Douglas County Bank & Trust Co.*, 940 F.2d 1389, 1391-92 (10th Cir. 1991) (a magistrate who transferred a motion to quash from the issuing court to a trial court acted within his authority).

Finally, Schilleci has entered an appearance on behalf of Hi-Tech and Wheat in the Northern District of Georgia and, having done so, is subject to personal jurisdiction of that district court.[12] *CMC Interconnect Techs., Inc. v. Fairchild Semiconductor Corp.*, 2009 U.S. Dist. LEXIS 22823 (D. Ariz. Mar. 4, 2009) (court transferred motion to quash because trial court was acquainted with the facts alleged to have produced a waiver, trial court made a prior ruling on a closely-related discovery issue, and trial court had before it key parties and lawyers involved in the dispute).

The Court may also stay deciding the motion, allow Hi-Tech and Wheat to seek relief (*e.g.*, a protective order) with Judge Pannell, and defer to Judge Pannell's decision. Staying the motion is warranted here because counsel for Hi-Tech and Wheat already informed Judge Pannell that they intended to file a motion for a protective order and Judge Pannell indicated that he expected that he would hear any such motion. *See* n.3, *supra*. This Court has the legal authority to stay a decision on the motion to quash to allow Hi-Tech, Wheat, and Schilleci to file a

[12] See Local Rule 83.1, Northern District of Georgia. Indeed, given that the privilege belongs to Hi-Tech and Wheat and not Schilleci, it is odd that Schilleci appears to be asserting the privilege not only on behalf of his clients but on his own as well.

motion for a protective order with Judge Pannell. *See, e.g., Clausnitzer v. Fed. Express Corp.*, 2007 U.S. Dist. LEXIS 61699, *9-13 (N.D. Ga. Aug. 21, 2007) (issuing court transferred motion for protective order to trial court, stayed motion to quash pending trial court's decision, and stated that it would issue a ruling on the motion to quash not inconsistent with the trial court's decision).

Dated: July 17, 2012
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2012, I caused a copy of Plaintiff's Motion for Reconsideration and Opposition to Motion to Quash Subpoenas Directed to Joseph P. Schilleci, Jr. to be served via electronic mail and Federal Express to the following counsel of record:

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